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RES JUDICATA IN ADMINISTRATIVE LAW

FINALITY of administrative determinations when tested on judicial review has received an abundance of scholarly attention.[1] But the numerous problems of administrative res judicata, relating to the conclusiveness of executive action in subsequent judicial or administrative proceedings other than direct review, have had little systematic exploration. Such inquiry is made difficult by the fact that direct judicial review of administrative action developed through techniques of collateral attack,[2] with the result that there has been a considerable blurring of the distinctions between the two methods of review.[3]

1. For a collection of references, see Abel, *Credit Given Administrative Determinations* (1937) 22 IOWA L. REV. 461, 517.

2. See Dickinson, *Judicial Control of Official Discretion* (1928) 22 AM. POL. SCI. R. 275; Jennings, *Tort Liability of Administrative Officers* (1937) 21 MINN. L. REV. 263.

3. An injunction proceeding may be treated as falling within either category. Compare State *ex rel.* Sorenson v. Knudtsen, 121 Neb. 270, 236 N. W. 696 (1931) with Shields v. Utah I. C. R. R., 305 U. S. 177 (1938).

Consequently, the only criterion of differentiation — necessarily an unsatisfactory one — is to regard as involving a res judicata problem those instances of review which courts treat as collateral.

Case results in res judicata situations can scarcely be explained by reference to underlying statutes. Often, it is true, a statutory provision of finality has been used as grounds for holding an administrative determination immune from review by the body which made it,[4] or from collateral attack.[5] But, with comparable frequency, identical results have been reached in the absence of such provision,[6] and instances may even be found in which a determination has been treated as open to correction despite a legislative stipulation that it be final.[7] In the great majority of cases,[8] legislators have given no consideration to the problem of the extent to which an administrative agency may control its own orders and determinations.[9] And even where a legislative intention has been indicated, courts have accorded it far from scrupulous observance.[10]

The judicial maxims on which the general principle of res judicata is based — *"Interest reipublicae ut sit finis litium"*[11] and *"Nemo debet bis vexari pro eadem causa"*[12] — express equally well the principal notions of expediency which are most frequently advanced as militating for a principle of administrative res judicata.[13] Opposing considerations chiefly include the desirability

4. Conley v. Upson Co., 197 App. Div. 815, 189 N. Y. Supp. 473 (3d Dep't 1921); Ford Motor Co. v. State, 178 Okla. 193, 62 P. (2d) 48 (1936).

5. Harrington v. Glidden, 179 Mass. 486, 61 N. E. 54 (1901).

6. Wright v. Edwards Hotel & C. Ry., 101 Miss. 470, 58 So. 332 (1912); Chapel v. Franklin County, 58 Neb. 544, 78 N. W. 1062 (1899).

7. Beckman v. J. W. Oelerich & Sons, 174 App. Div. 353, 160 N. Y. Supp. 791 (3d Dep't 1916).

8. Workmen's compensation statutes are a conspicuous exception. See notes 71-92 *infra*, and accompanying text.

9. See, however, the provisions of the federal income tax statutes for successive deficiency assessments, cited *infra* note 125, and 49 STAT. 457 (1935), 29 U. S. C. § 160(d) (Supp. 1939) and 52 STAT. 112 (1938), 15 U. S. C. § 45(b) (Supp. 1939) giving the N. L. R. B. and the F. C. C. extensive powers of control over their orders.

10. See notes 74-92 and 115-120 *infra*, and accompanying text.

11. "It is a public concern that there be an end to litigation." Cases in which this doctrine has been applied to administrative determinations include Hayden v. R. Wallace & Sons Mfg. Co., 100 Conn. 180, 123 Atl. 9 (1923); Happy Coal Co. v. Hartburger, 251 Ky. 779, 65 S. W. (2d) 977 (1934).

12. "No one ought to be twice vexed for the same cause." For application of this principle to administrative law situations, see Derrick v. Gaston School Dist., 172 S. C. 472, 174 S. E. 431 (1934); State *ex rel.* Schuster Realty Co. v. Lyons, 184 Wisc. 175, 197 N. W. 585 (1924).

13. It is also argued that an administrative determination which will give rise to vested interests should not be disturbed, People *ex rel.* Chase v. Wemple, 144 N. Y. 478, 39 N. E. 397 (1895), and that individuals are entitled to have their rights and liabilities settled by a single decision on which reliance may be placed. Rothschild & Co. v. Marshall, 44 F. (2d) 546 (C. C. A. 9th, 1930).

of accurate and thoroughgoing statutory enforcement[14] and the injustice of permitting rights and obligations to be perverted by erroneous administrative action.[15]

The general problem of conclusiveness falls into three rather clearly defined major subdivisions: (1) the power of an administrative officer or tribunal to change a possibly erroneous prior determination in further dealings with the same cause of action or controversy; (2) the effect of such administrative determinations in subsequent judicial proceedings relating to the same controversy or relief, *i.e.*, a judicial collateral attack; (3) their effect on a later judicial or administrative decision of a wholly independent controversy. Any consideration of the conclusiveness of administrative action must also include the independent, but closely related, question of the effect of administrative regulations or rulings (especially when retroactive alterations are sought to be made), and the more general question of whether an estoppel may arise from the acts of a government officer.

The three major issues outlined above are, from the standpoint of strict doctrine, actually one. Logically, a valid determination would be res judicata in all three situations, or in none. This orthodox channel of argument has often been followed by the courts.[16] Yet, not infrequently, courts have denied the existence of this doctrinal connection[17] holding, for example, that a workman's compensation award was conclusive in a collateral attack or in an independent proceeding although still subject to alteration by the tribunal which made it.[18] Again, determinations of the Patent Office have been binding within the office, but not in the courts.[19] A brief survey of the doctrines, general rules and significant factors associated with each of these principal situations will serve as introduction to the more detailed consideration of res judicata in each of several types of administrative agencies.

Collateral Attack. Fundamental to collateral attack is the doctrine that administrative action can always be defeated if such action is totally void for having been undertaken without jurisdiction.[20] This, of course, merely

14. F. C. C. v. Pottsville Broadcasting Co., 60 Sup. Ct. 437 (U. S. 1940); Fair v. Hartford Rubber Works, 95 Conn. 350, 111 Atl. 193 (1920).

15. Industrial Comm. v. Dell, 104 Ohio St. 389, 135 N. E. 669 (1922).

16. Sudbury v. Board of Comm'rs, 157 Ind. 446, 62 N. E. 45 (1901); Industrial Comm. v. Davis, 126 Ohio St. 593, 186 N. E. 505 (1933).

17. Stratton v. Railroad Comm., 186 Calif. 119, 198 Pac. 1051 (1921).

18. Biederzycki v. Farrel Foundry & Mach. Co., 103 Conn. 701, 131 Atl. 739 (1926); Slattery v. Board of Est. & Apport., 271 N. Y. 346, 3 N. E. (2d) 505 (1936).

19. A decision in an interference is res judicata, as to all issues which could have been raised, in a subsequent interference [New Depart. Mfg. Co. v. Robinson, 39 App. D. C. 504 (1912)] and on a subsequent application [*In re* Marconi, 38 App. D. C. 286 (1912)]. An inventor has no right to a second application where a first has been dismissed. *In re* Barratt's Appeal, 14 App. D. C. 255 (1899). See Comment (1938) 6 GEO. WASH. L. REV. 364. But Patent Office determinations are not conclusive in infringement actions, even if affirmed by the Court of Customs and Patent Appeals. Morrell & Co. v. Doyle, 97 F. (2d) 232 (C. C. A. 7th, 1938).

20. Miller v. Horton, 152 Mass. 540, 26 N. E. 100 (1891).

raises the thorny question of what facts are jurisdictional, the answers to which reveal little unanimity.[21] Where jurisdiction has been conceded, there has been even greater diversity as to the protection to be given to the administrative action. Various courts have regarded such action as conclusive, as prima facie correct, or as completely without persuasive effect.[22] Some cases have gone so far as to accord administrative decisions all the presumptions of jurisdictional validity attaching to judgments of record.[23]

Determinations which are deemed conclusive have been customarily labeled judicial or quasi-judicial in nature,[24] while those susceptible of collateral attack have been characterized variously as legislative, executive, administrative or ministerial.[25] The doctrinal lines have not been strictly drawn, however, for even such concededly legislative activities as rate making, and such ministerial activities as the levy of assessments, have been said to be res judicata when questioned collaterally.[26] And, of course, the contents of concepts such as "quasi-judicial" and "administrative" are far from clear.[27]

Instances may be found in which administrative action taken without notice and hearing have been held immune from collateral attack.[28] But the prevailing rule is that in the absence of these elements of due process, collateral review will be available.[29] A more accurate criterion for immunity, however, is the availability of direct review.[30] State tax assessments, for example, although ordinarily made ex parte, have commonly been held binding in col-

21. Compare London Guar. & Acc. Co. v. Sterling, 233 Mass. 485, 124 N. E. 286 (1919) with Thaxter v. Finn, 178 Calif. 270, 173 Pac. 163 (1918). *Cf.* dissent in Crowell v. Benson, 285 U. S. 22, 65, 73 (1932).

22. Thomas v. Churchill, 84 Me. 446, 24 Atl. 899 (1892) (conclusive); Imperial Brass Mfg. Co. v. Hockney, 75 F. (2d) 689 (C. C. A. 7th, 1935) (prima facie correct); Sears v. Stone County, 105 Mo. 236, 16 S. W. 878 (1891) (without effect).

23. Chicago & A. Ry. v. Sutton, 130 Ind. 405, 30 N. E. 291 (1892). The presumption of jurisdictional validity may be held conclusive. People v. Los Angeles, 133 Cal. 338, 65 Pac. 749 (1901).

24. Colusa County v. DeJarnett, 55 Cal. 373 (1880); Longinette v. Shelton, 52 S. W. 1078 (Tenn. 1898).

25. Prentis v. Atlantic Coast Line, 211 U. S. 210 (1908) (legislative); Board of County Comm'rs v. Cypert, 65 Okla. 168, 166 Pac. 195 (1917) (executive); Board of Comm'rs v. Trautman, 204 Ind. 362, 184 N. E. 178 (1933) (administrative or ministerial).

26. Southern I. Ry. v. Railroad Comm., 172 Ind. 113, 87 N. E. 966 (1909) (rate making); Langhout v. First Nat. Bank, 191 Iowa 957, 183 N. W. 506 (1921) (assessments).

27. See Brown, *Administrative Commissions and the Judicial Power* (1935) 19 MINN. L. REV. 261, 275.

28. Kennedy v. Gibson, 8 Wall. 498 (U. S. 1869); State *ex rel.* Topping v. Houston, 94 Neb. 445, 143 N. W. 796 (1913).

29. New Hampshire Fire Ins. Co. v. Murray, 105 F. (2d) 212 (C. C. A. 7th, 1939); City of W. Univ. Place v. State *ex rel.* Kirby, 56 S. W. (2d) 1081 (Tex. Civ. App. 1933).

30. *Cf.* Wright v. Edwards Hotel & C. Ry., 101 Miss. 470, 58 So. 332 (1912); Champlin v. Tax Comm., 163 Okla. 185, 20 P. (2d) 904 (1933).

lateral proceedings because a technique of review is provided.[31] On the other hand, a formal determination of the Interstate Commerce Commission made after a hearing, for which no statutory method of review is provided, may be attacked in an independent suit in equity.[32]

Administrative Control of Determinations. The characterization of a determination as quasi-judicial has been almost universally regarded as sufficient ground for holding that the body which made the determination has no power to change it in the future.[33] But in thus extending the doctrine of res judicata to administrative decisions, the courts have expressly or tacitly denied the applicability of the companion judicial rule that a court has control over its adjudications at least during the term at which they were rendered.[34] Possibly the difficulty of ascertaining "length of term" or an administrative equivalent has led to this result.[35] A more probable reason for this denial of power to control is the prevailing and apparently universal judicial disinclination toward allowing an administrative tribunal to exercise its discretion or judgment more than once on the same matters.[36]

Action denominated administrative may be regarded as *per se* subject to reversal;[37] or its reviewability may be treated as a question of statutory interpretation. But since all administrative action must be grounded in statutory authority, it is easier to say that without a statutory provision, there is no power of reversal[38] than it is to say that in the absence of statutory prohibition, the power to reverse should not be denied.[39] Another ground for

31. Milheim v. Moffat Tunnel Dist., 262 U. S. 710 (1922); Huntsville v. Goodenrath, 13 Ala. App. 579, 68 So. 676 (1915).

32. Shields v. Utah I. C. R. R., 305 U. S. 177 (1938); *cf.* Farmers State Bank v. Bowie County, 95 S. W. (2d) 1304 (Tex. Comm. App. 1936).

33. Lilienthal v. Wyandotte, 286 Mich. 604, 282 N. W. 837 (1938); Shugg v. Anaconda Copper Mining Co., 100 Mont. 159, 46 P. (2d) 435 (1935).

34. Kalinick v. Collins Co., 116 Conn. 1, 163 Atl. 460 (1932). *Contra:* Holmberg v. Chicago, St. P., M. & O. R. R., 115 Neb. 727, 214 N. W. 746 (1927). In Equitable Trust Co. v. Hamilton, 226 N. Y. 241, 123 N. E. 380 (1919) an order was held revocable until expiration of Board members' term of office. It is generally held, however, that changes in incumbents do not affect res judicata rules. Happy Coal Co. v. Hartburger, 251 Ky. 779, 65 S. W. (2d) 975 (1934).

35. But in workmen's compensation cases, the duration of the periodically-paid award would be a natural and easily administered period. Yet courts have never in the absence of specific statutory provision allowed industrial accident tribunals such control. See notes 74-87 *infra*, and accompanying text.

36. Early statements of this attitude may be found in United States v. Bank of Metropolis, 15 Pet. 377, 400 (U. S. 1841); United States v. Burchard, 125 U. S. 176, 180 (1888).

37. People v. McClellan, 118 App. Div. 177, 103 N. Y. Supp. 146 (1st Dep't 1907), *aff'd*, 188 N. Y. 618, 81 N. E. 1171 (1908).

38. Conners' Case, 121 Me. 37, 115 Atl. 520 (1921); Hyland v. Waldo, 158 App. Div. 654, 143 N. Y. Supp. 901 (1st Dep't 1913).

39. Pearson v. Williams, 202 U. S. 281 (1906); Gage v. Gunthar, 136 Cal. 338, 68 Pac. 710 (1902).

the rule against subsequent reversal employs the *functus officio* concept: the officer's authority is exhausted by its initial exercise.[40]

There appear to be two rough functional generalizations relative to the power of reversal. In the first place, determinations of the existence of a fact or status with respect to a present or past group of facts will not be subject to later alteration. Thus the decision of a city council in an election contest, the denial of a license, a dismissal or refusal to dismiss by a board or officer have all been held to preclude the tribunal in question from later changing its position.[41] An administrative agency is at complete liberty, on the other hand, to change prospectively any regulation[42] or rate[43] which it has established.

In the second place, even a determination described above as having conclusive effect will not have such effect when there is, in view of the subject matter in question, a general likelihood that a subsequent determination of the same matter will bring to the attention of the tribunal new evidence or new considerations which could not reasonably have been presented sooner. The decision on a patent application or interference,[44] for example, is res judicata within the office because it is probable that all arguments and proofs on the issue of priority can and will be offered at the first opportunity. On the other hand, determinations by immigration inspectors of an individual's right to enter the country, based necessarily on a summary and superficial investigation, are not conclusive,[45] although a similar determination by a United States Commissioner on full hearing was held conclusive.[46] In workmen's compensation proceedings, findings as to the duration and seriousness of incapacity are subject to modification,[47] but questions of scope of employment and compensability of injury are not.[48] This is true even though the

40. See dissent in Austin Co. v. Comm'r of Int. Rev., 35 F. (2d) 910, 913 (C. C. A. 6th, 1929). *Contra: In re* Smiling, 193 N. C. 448, 137 S. E. 319 (1927).

41. Muncy v. Hughes, 265 Ky. 588, 97 S. W. (2d) 546 (1936) (election contest). See cases cited *infra* in notes 139, 140 (licenses) and 154 (dismissals).

42. Bates & Guild Co. v. Payne, 194 U. S. 106 (1904); People *ex rel.* N. Y. Fire Ins. Exch. v. Phillips, 203 App. Div. 13, 196 N. Y. Supp. 202 (3d Dep't 1922); *cf.* Helvering v. Wilshire Oil Co., 60 Sup. Ct. 18 (U. S. 1939).

43. Such freedom is commonly provided for by statute. Puget Sound Elect. Ry. v. Lee, 207 Fed. 860 (W. D. Wash. 1913); Mathieson Alkali Works v. Norfolk & W. Ry., 147 Va. 426, 137 S. E. 608 (1927).

44. See cases cited note 19 *supra*.

45. Pearson v. Williams, 202 U. S. 281 (1906). But, according to statute, a determination against the right of admission is conclusive. Haw Moy v. North, 183 Fed. 89 (C. C. A. 9th, 1910), *cert. denied*, 223 U. S. 717 (1911).

46. Leung Jun v. United States, 171 Fed. 413 (C. C. A. 2d, 1909).

47. See notes 71 and 72 *infra*.

48. Gray v. Burdin, 125 Neb. 547, 250 N. W. 907 (1933) (scope of employment); Pinkton Hardware Co. v. Hart, 159 Okla. 6, 12 P. (2d) 681 (1932) (compensability of injury).

pertinent statute purports to grant the compensation tribunal full control over all its determinations.[49]

Applicability of a res judicata rule seemingly does not depend on the formality of the original proceedings. Tribunals and agencies have been held powerless to correct former errors made without a hearing,[50] or after a hearing typically incomplete.[51] Nor is the type of tribunal significant. The same results were reached when a workmen's compensation act was administered by a court instead of an independent administrative body.[52] The rules relative to dismissals are the same whether the proceedings are before the village governing board or the mayor.[53] Even different determinations of the same officer will be treated in diverse ways.[54] Finally, although there have been strenuous judicial protests against attributing res judicata to proceedings in which the adjudicator was a party,[55] the fact that the proceedings before the tribunal are not between contesting private individuals will not necessarily prevent the application of the doctrine.[56]

To support their position that administrative officers should be restricted to a single exercise of their discretion, courts have not only stressed the considerations of policy underlying the general doctrine of res judicata, but have argued that the opposite rule would lead to government by whim and caprice,[57] and induce fraud and improper influence.[58] That the original administrative action may, as a practical matter, be hasty and based on inadequate information has been widely recognized, but has generally been deemed of

49. Compare Hayden v. R. Wallace & Sons Mfg. Co., 100 Conn. 180, 123 Atl. 9 (1923) with Gonirenki v. American Steel & Wire Co., 106 Conn. 1, 137 Atl. 26 (1927).

50. Edens v. L. E. Dixon Constr'n Co., 42 Ariz. 519, 27 P. (2d) 1107 (1934) (workmen's compensation); Miller v. Copeland's Estate, 139 Miss. 788, 104 So. 176 (1925) (tax assessment).

51. Watkins v. State Bd. of Pharmacy, 170 Miss. 26, 154 So. 277 (1934) (grant of a license).

52. For example, a judgment will not be res judicata in the face of change of physical condition. Mustanen v. Diamond Coal & Coke Co., 50 Wyo. 462, 62 P. (2d) 287 (1936).

53. Stowell v. Santora, 256 App. Div. 934, 9 N. Y. S. (2d) 866 (2d Dep't 1939) (village board); Lilienthal v. Wyandotte, 286 Mich. 604, 282 N. W. 837 (1938) (mayor). See note 154 *infra*, and accompanying text.

54. Different rules of conclusiveness attach to rate orders and reparations orders of the I. C. C. See notes 195-203 *infra*. The same is true with various determinations of county boards. Board of County Comm'rs v. Cypert, 65 Okla. 168, 166 Pac. 195 (1917).

55. Board of Comm'rs v. Heaston, 144 Ind. 583, 41 N. E. 457 (1895); Royce v. Rosasco, 159 Misc. 236, 287 N. Y. Supp. 692 (Sup. Ct. 1936).

56. Little v. Board of Adjustment, 195 N. C. 793, 143 S. E. 827 (1928) (licensing board); *In re* Barratt's Appeal, 14 App. D. C. 255 (1899) (patent application).

57. Champlin v. Tax Comm., 163 Okla. 185, 20 P. (2d) 904 (1923).

58. Osterhoudt v. Rigney, 98 N. Y. 222 (1885); but the opposite viewpoint has been taken in Sears v. Stone County, 105 Mo. 236, 16 S. W. 878 (1891).

minor importance as against the advantages of convenience and certainty accruing from the res judicata principle.[59]

Independent Proceedings. The number of cases involving the question of the conclusiveness of determinations in wholly independent proceedings is not large enough to permit of confident generalization, other than that the principle of res judicata has been applied to a wide variety of tribunals. Here also the dichotomy of quasi-judicial as against administrative action has been brought into play; the former has been held conclusive, the latter not.[60] A general prerequisite for conclusiveness in any collateral proceeding appears to be the finality of the original determination, in the sense that no further proceedings are necessary to make the determination obligatory upon the parties.[61] Determinations of the Board of Tax Appeals were originally ineffectual except as prima facie evidence in a subsequent suit in a federal circuit court of appeals, and they were accordingly regarded as not constituting res judicata.[62] The opposite conclusion was reached after the Revenue Act of 1926 had made provision for finality of the Board's decisions in the absence of appeal.[63] Again, a reparations order of the ICC, whose only conclusive effect by statute is as prima facie evidence in a federal district court suit for enforcement, has been held inconclusive,[64] whereas an order directing a carrier to grant certain credits for services to a shipper (which order must be appealed from for its effect to be avoided), has been recognized as res judicata.[65]

59. Miller v. Copeland's Estate, 139 Miss. 788, 104 So. 176 (1925). *Contra:* Equitable Trust Co. v. Hamilton, 226 N. Y. 241, 123 N. E. 380 (1919).

60. Determinations labeled quasi-judicial may be followed elsewhere. Swift & Co. v. Walden, 176 Okla. 268, 55 P. (2d) 71 (1936) (workmen's compensation); State v. Corron, 73 N. H. 434, 62 Atl. 1044 (1905) (license board). But the results of proceedings considered investigatory in character are denied conclusive effect. Proper v. John Bene & Sons, 295 Fed. 729 (E. D. N. Y. 1923) (F. T. C.); American Motorists Ins. Co. v. Central Garage, 86 N. H. 362, 169 Atl. 121 (1933) (insurance comm'r).

61. A workmen's compensation award has been held not to be final where all that remained to be done was to secure judgment on motion. United States Fidelity & Guar. Co. v. Lawson, 15 F. Supp. 116 (S. D. Ga. 1936). *Contra:* Taylor v. Robert Ramsay Co., 139 Md. 113, 114 Atl. 830 (1920).

62. See Griswold, *Res Judicata in Federal Tax Cases* (1937) 46 YALE L. J. 1320, 1323.

63. Pelham Hall Co. v. Carney, 27 F. Supp. 388 (D. Mass. 1939); see Paul and Zimet, *Federal Tax Litigation—Selected Problems in Res Judicata* (1937) 32 ILL. L. REV. 139, 140.

64. Clark Bros. Coal Mining Co. v. Pennsylvania R. R., 241 Pa. 515, 88 Atl. 754 (1913), *reversed on other grounds,* 283 U. S. 456 (1914).

65. New York C. & H. R. R. R. v. General Elect. Co., 83 Misc. 529, 146 N. Y. Supp. 322 (Sup. Ct. 1914), *aff'd,* 219 N. Y. 227, 114 N. E. 115 (1916), *cert. denied,* 243 U. S. 636 (1917).

WORKMEN'S COMPENSATION TRIBUNALS

An almost complete immunity from collateral attack has been extended to awards of state workmen's compensation tribunals.[66] Protection has on occasion been extended to include the presumption of jurisdictional sufficiency associated with the acts of courts of record.[67] Moreover, both state and federal courts have frequently held that even errors with respect to issues ordinarily denominated jurisdictional — such as the nature of the commerce in which the injured individual was engaged — will not expose the administrative order to collateral nullification.[68] These views are not incompatible with *Crowell v. Benson*,[69] which established the doctrine that on direct review a trial *de novo* must be given on jurisdictional issues. It is familiar jurisprudence that the "lack of jurisdiction" concept has varying content for different purposes, so that what is "jurisdictional" on direct review is not necessarily "jurisdictional" in a collateral review.[70]

This generous protection from collateral attack has been accompanied by severe restrictions on control by compensation tribunals over their own determinations, not only apart from, but even in spite of, apparent legislative purpose. Practically all compensation statutes provide that an award may be modified where an increase or decrease in the physical disability of the injured workman has subsequently occurred.[71] Indeed, this rule is considered so essential to the policy of compensation systems that it has, on occasion, been imported into the scheme of administration apart from distinct statutory

66. Collateral attack may be made in a variety of ways. Bach v. Interurban Ry., 171 N. W. 723, 174 N. W. 333 (Iowa 1919) (defense in suit to enforce award); *In re* Philips, 206 App. Div. 314, 200 N. Y. Supp. 639 (1923) (insurer's receivership proceedings). The principal ground for immunity is the availability of direct review under the compensation scheme. Fitt v. Central Ill. Pub. Serv. Co., 273 Ill. 617, 113 N. E. 155 (1916).

67. Howard v. Duncan, 163 Okla. 142, 21 P. (2d) 489 (1933). *Contra:* Hoffman v. New York, N. H. & H. R. R., 74 F. (2d) 227 (C. C. A. 2d, 1934), *cert. denied*, 294 U. S. 715 (1935).

68. Taylor v. Robert Ramsey Co., 139 Md. 113, 114 Atl. 830 (1920); Pillsbury v. Alaska Packers Ass'n, 85 F. (2d) 758 (C. C. A. 9th, 1936), *rev'd on other grounds*, 301 U. S. 174 (1937) (by implication); *cf.* Chicago, R. I. & P. Ry. v. Elder, 270 U. S. 611 (1926). *Contra:* London Guar. & Acc. Co. v. Sterling, 233 Mass. 485, 124 N. E. 286 (1919).

69. 285 U. S. 22 (1932). This case has frequently been misinterpreted, however, as holding that an erroneous determination of the nature of commerce is such a jurisdictional defect as will expose an award to collateral attack. See Comment (1939) 39 COL. L. REV. 259, 271; (1940) 34 ILL. L. REV. 626. This is probably due to the fact that the statutory direct review was by "injunction" proceedings.

70. Lack of federal jurisdiction, for example, will not open a federal court judgment to collateral attack. Des Moines Nav. Co. v. Iowa Homestead Co., 123 U. S. 552 (1887); *cf.* also Thaxter v. Finn, 178 Cal. 270, 173 Pac. 163 (1918).

71. See (1931) 41 YALE L. J. 148. Judicial affirmance of an award does not oust the power to modify for change of conditions. State *ex rel.* Griffin v. State Indust. Acc. Comm., 145 Ore. 443, 28 P. (2d) 237 (1934).

authorization.[72] Yet courts, zealous for the principle of conclusiveness, have held that, since only an "increase or decrease" in compensation is contemplated, an original denial of an award owing to insufficient incapacity can not be corrected for a later aggravation of physical condition.[73]

An even clearer demonstration of judicial imposition of res judicata may be found in the widespread rule that all findings implicit in compensation orders[74] are conclusive on all matters arising prior to the order,[75] including questions of the previous physical condition of the compensation claimant.[76] It has been held immaterial whether the subsequent proceedings be denominated a rehearing, reopening or an application for modification.[77] In judicial review of the later proceedings, moreover, the court has been bound by the same limitations as the tribunals whose action was under review.[78]

These results have been reached under statutes varying widely in form. A first group of compensation enactments contains provision for modification of an award only on a showing of change in extent of disability.[79] Here, a res judicata rule as to other matters,[80] in accordance with the maxim *"expressio unius est exclusio alterius,"* may be coincident with legislative intention. A second group of statutes provides for a continuing jurisdiction in the compensation tribunal to make such alterations as in the opinion of the tribunal may be justified, but contains a separate clause calling for modification on change of physical condition.[81] With little exception, the courts have held that the second clause qualified the first, and that the continuing jurisdiction might be exercised only where the degree of incapacity had

72. Zagar v. Industrial Comm., 40 Ariz. 479, 14 P. (2d) 472 (1932).

73. Hurst v. Independent Constr'n Co., 136 Kan. 583, 16 P. (2d) 540 (1932). *Contra:* Patterson Steel Co. v. Bailey, 148 Okla. 153, 298 Pac. 282 (1931), (1931) 31 COL. L. REV. 1206.

74. The order may grant, deny or discontinue compensation. Edens v. L. E. Dixon Constr'n Co., 42 Ariz. 519, 27 P. (2d) 1107 (1934); Gray v. Burdin, 125 Neb. 547, 250 N. W. 907 (1933); Simpson Constr'n Co. v. Industrial Bd., 275 Ill. 366, 114 N. E. 138 (1916).

75. See cases cited in notes 79-86 *infra; cf.* Riley v. Board of Trustees, 210 Iowa 449, 228 N. W. 578 (1930), in which an identical rule was applied to an order denying a disability pension.

76. Comer v. Standard Oil Co., 131 Me. 386, 163 Atl. 269 (1932).

77. Brown v. Industrial Comm., 48 Ariz. 161, 59 P. (2d) 323 (1936); Conners' Case, 121 Me. 37, 115 Atl. 520 (1921). But there may be statutory provision for rehearing within a specified time. Thrash v. Graver Corp., 131 Okla. 260, 268 Pac. 718 (1928).

78. Pillsbury v. Alaska Packers Ass'n, 85 F. (2d) 758 (C. C. A. 9th, 1936), *rev'd on other grounds,* 301 U. S. 174 (1937); Brown v. Industrial Comm., 48 Ariz. 161, 59 P. (2d) 323 (1936).

79. GA. CODE (1933) § 114-709; BURNS IND. STAT. (1933) § 40-1410.

80. Lattimore v. Lumbermen's Mut. Casualty Co., 35 Ga. App. 250, 133 S. E. 291 (1926); Carson-Payson Co. v. Industrial Comm., 285 Ill. 635, 121 N. E. 264 (1918).

81. ORE. CODE ANN. (1930) 49-1836(c) 49-1827(i); MONT. REV. CODE (1935) §§ 2952, 2956.

changed.[82] Such an interpretation may be reinforced by invoking a stipulation, appearing elsewhere in the statute, for finality of a compensation order in the absence of review proceedings.[83] But this conclusion is by no means inescapable. Both the New York and the Oklahoma statutes, for example, contain all three clauses in identical language, but only the latter state's statute has been given a res judicata construction.[84] A third group of statutes provides for continuing jurisdiction without specification of the grounds on which it is to be exercised.[85] Yet the same rule of conclusiveness in the absence of changed conditions has prevailed.[86] Only where there has been an unmistakable expression of legislative desire, such as stipulation for reversal on the ground of mistake, has a contrary rule been adopted.[87]

Judicial predilection for res judicata in disregard of legislative policy is strikingly reflected in the history of the federal Longshoremen's and Harbor Workers' Compensation Act.[88] Originally the Act provided only for modification on change of conditions, and it was held that these were the exclusive grounds on which a reopening could be had.[89] The Act was subsequently amended to permit a new compensation order because of a mistake of fact, "whether or not a compensation order has been issued." Decisions were nevertheless handed down to the effect that if there were no error in ruling on the evidence presented at the first hearing, there was no such mistake of fact as warranted reversal;[90] and that there could be no reversal if a grant of compensation were originally denied.[91] These decisions provoked further

82. State *ex rel.* Roundup Coal Mining Co. v. Industrial Acc. Bd., 94 Mont. 386, 23 P. (2d) 253 (1933); American Oil & Ref. Co. v. Kincannon, 154 Okla. 129, 3 P. (2d) 877 (1931), (1932) 9 N. Y. U. L. Q. REV. 383; *cf.* Schmitt v. American Brass Co., 109 Conn. 599, 145 Atl. 164 (1929).

83. Roxanna Petroleum Co. v. Hornberger, 150 Okla. 257, 1 P. (2d) 393 (1931), (1931) 41 YALE L. J. 148.

84. Compare Di Donato v. Rosenberg, 256 N. Y. 412, 176 N. E. 822 (1931) with Pinkton Hardware Co. v. Hart, 159 Okla. 6, 12 P. (2d) 681 (1932).

85. MASS. GEN. LAWS (1932) c. 152, §§ 11, 12; MICH. STAT. ANN. (1937) § 17.188.

86. Kareske's Case, 250 Mass. 220, 145 N. E. 301 (1924); Sampson v. Michigan Copper & Brass Co., 274 Mich. 592, 265 N. W. 472 (1936).

87. London Guar. & Acc. Co. v. Industrial Comm., 78 Colo. 478, 242 Pac. 680 (1925); Industrial Comm. v. Dell, 104 Ohio St. 389, 135 N. E. 669 (1922). In California, a statutory amendment caused the court to drop its rule that awards were res judicata. Bartlett Hayward Co. v. Industrial Acc. Comm., 203 Cal. 522, 265 Pac. 195 (1928).

Judicial affirmance of an award, however, will oust a continuing jurisdiction to correct errors. United Dredging Co. v. Industrial Acc. Comm., 208 Cal. 705, 284 Pac. 922 (1930). *Contra:* DiDonato v. Rosenberg, 256 N. Y. 412, 176 N. E. 822 (1931).

88. 44 STAT. 1437 (1927), 48 STAT. 807 (1934), 52 STAT. 1167 (1938), 33 U. S. C. § 922 (Supp. 1939).

89. Rothschild & Co. v. Marshall, 44 F. (2d) 546 (C. C. A. 9th, 1930).

90. Gravel Products Corp. v. McManigal, 14 F. Supp. 414 (W. D. N. Y. 1936).

91. La Terza v. Lowe, 15 F. Supp. 978 (E. D. N. Y. 1936). *Contra:* Maryland Casualty Co. v. Cardillo, 99 F. (2d) 432 (App. D. C. 1938).

statutory amendment, which apparently leave the compensation officials with practically full control over their prior orders.[92]

In those jurisdictions adopting the narrower view that each order of the compensation tribunal is res judicata except for change in conditions, it is generally immaterial whether the prior findings erred on a matter of fact[93] or of law,[94] or whether they were made without a hearing.[95] But there has been some relaxation of the res judicata rule. Newly discovered evidence, if not negligently omitted earlier, has been held to justify a reopening of matters once decided.[96] Likewise, proof of a newly-discovered internal injury, as distinct from a change of physical condition, has sufficed to justify a modification.[97] Reopening has also been allowed where an award was procured through fraudulent testimony.[98]

The argument has been made that a liberal construction of workmen's compensation statutes requires that no injured employee be deprived of his due compensation through administrative error.[99] This argument gains force in the light of the fact that the public has an interest in seeing that incapacity for self-support should not go uncompensated. But if the claimant is to be unhampered by res judicata, the courts feel that the same privilege should be accorded to employers.[100] Abrogation of the res judicata principle, furthermore, would allow delay and the perpetuation of controversy, which are far more likely to be injurious to the employee than to the employer.[101] These latter considerations appear more compelling than those arguing for a complete freedom of reversal. It seems distinctly undesirable, on the other hand, to apply res judicata to the frequent determinations made without full hearing.

92. Bethlehem Shipbldg. Corp. v. Cardillo, 102 F. (2d) 299 (C. C. A. 1st, 1939), *cert. denied,* 307 U. S. 645 (1939).

93. Oklahoma Ry. v. State Industrial Comm., 147 Okla. 129, 295 Pac. 216 (1931).

94. Hayden v. R. Wallace & Sons Mfg. Co., 100 Conn. 180, 123 Atl. 9 (1923) (employment relationship).

95. An order will be binding even though made after the perfunctory hearing usually had in originally uncontested cases. Edens v. L. E. Dixon Constr'n Co., 42 Ariz. 519, 27 P. (2d) 1107 (1934). Even an agreement between the parties, when approved by the compensation tribunal according to statute, will be conclusive. Pedlow v. Swartz Elect. Co., 68 Ind. App. 400, 120 N. E. 603 (1918). In general, orders made by subordinate officials are as conclusive as those of the commission or board itself. Martin v. Kalamazoo Veg. Parchment Co., 271 Mich. 514, 260 N. W. 758 (1935).

96. Gonirenki v. American Steel & Wire Co., 106 Conn. 1, 137 Atl. 27 (1927). *Contra:* American Oil & Ref. Co. v. Kincannon, 154 Okla. 129, 3 P. (2d) 877 (1931).

97. Devoe's Case, 131 Me. 452, 163 Atl. 789 (1933). *Contra:* Simpson Constr'n Co. v. Industrial Board, 275 Ill. 366, 114 N. E. 138 (1916).

98. Grabowski v. Miskell, 97 Conn. 76, 115 Atl. 691 (1921).

99. Beckman v. J. W. Oelerich & Son, 174 App. Div. 353, 160 N. Y. Supp. 791 (3d Dep't 1916).

100. Conners' Case, 121 Me. 37, 115 Atl. 520 (1921).

101. *Cf.* Conners' Case, 121 Me. 37, 115 Atl. 520 (1921); Shugg v. Anaconda Copper & Mining Co., 100 Mont. 159, 46 P. (2d) 435 (1935).

To escape the confinements of res judicata, compensation tribunals have sought to reserve jurisdiction over their orders. The majority of these efforts have been frustrated on the ground that such a reservation is outside statutory authority.[102] The SEC and the NLRB, on the other hand, have frequently used this device as a means of escaping whatever effect their orders may have as res judicata.[103] The paramount public interest protected by these federal agencies, demanding a continuing regulatory jurisdiction, makes it probable that their use of the technique will not come under judicial condemnation.[104]

A full-fledged res judicata rule has generally been applied to compensation findings when offered as evidence in independent proceedings — whether judicial or administrative.[105] The most conspicuous exception is the prevailing rule that the receipt of one compensation award will not bar another compensation proceeding in another state whose statute also covers the injury giving rise to the claimed disability.[106] Even in this situation, however, the claimant has been bound by findings in the initial proceeding,[107] and invariably charged with whatever sums he received as the result of the initial proceedings.[108] Another exception to the res judicata rule may be made where the law applicable to the original award permits its complete control by the compensation tribunal.[109] But the greater number of cases hold that even under such circumstances, the award may not be collaterally questioned.[110]

102. United Fruit Co. v. Pillsbury, 55 F. (2d) 369 (N. D. Calif. 1932); Trigg v. Industrial Comm., 364 Ill. 581, 5 N. E. (2d) 394 (1936). But *cf.* Utah-Idaho C. Ry. v. Public Util. Comm., 64 Utah 54, 227 Pac. 1025 (1924) (state railroad commission).

103. Matter of Mass. Util. Ass'n, 3 S. E. C. 639 (1938); Iowa So. Util. Co., 15 N. L. R. B. 580 (1939).

104. In C. G. Conn. v. N. L. R. B., 108 F. (2d) 390 (C. C. A. 7th, 1939), this practice was expressly sanctioned in the case of the Labor Board. See notes 141-146 *infra.*

105. Biederzycki v. Farrel Foundry & Mach. Co., 103 Conn. 701, 131 Atl. 739 (1926); Amalgamated Roofing Co. v. Travelers Ins. Co., 300 Ill. 487, 133 N. E. 259 (1921). Issues not actually litigated have been held concluded in the independent proceeding if they might have been raised in the compensation proceeding. Royal Indem. Co. v. Heller, 256 N. Y. 322, 176 N. E. 410 (1931); Ocean Acc. & Guar. Corp. v. Pruitt, 58 S. W. (2d) 41 (Tex. Comm. App. 1933). *Contra:* Hoffman v. New York, N. H. & H. R. R., 74 F. (2d) 227 (C. C. A. 2d, 1934), *cert. denied,* 294 U. S. 715 (1934).

106. See Abel, *Credit Given Administrative Determinations* (1937) 22 IOWA L. REV. 461, 486.

107. Harshbarger v. Fairbanks, Morse & Co., 10th Biennial Report of Iowa Workmen's Compensation Service (1932) 77; Di Carvallo v. Di Napoli, 13 N. J. Misc. 603, 180 Atl. 488 (N. J. Dept. of Labor, 1935).

108. United States Fidelity & Guar. Co. v. Lawson, 15 F. Supp. 116 (S. D. Ga. 1936); Gilbert v. Des Lauriers Column Moulding Co., 180 App. Div. 59, 167 N. Y. Supp. 274 (3d Dept. 1917).

109. Employers' Liab. Assur. Corp. v. Industrial Acc. Comm., 7 Cal. App. (2d) 190, 45 P. (2d) 371 (1935).

110. Nash v. Brooks, 276 N. Y. 75, 11 N. E. (2d) 545 (1937); Ocean Acc. & Guar. Corp. v. Pruitt, 58 S. W. (2d) 41 (Tex. Comm. App. 1933).

TAXING AUTHORITIES

Courts appear to be in general agreement that state tax assessments, if within the jurisdiction of the taxing authority, are not subject to collateral attack. This rule has been pronounced in suits for refunds (although the taxes may have been paid under protest), in proceedings to enjoin the collection of a tax, in suits by the government to collect an assessment and even where a tax claim has been submitted in 77B proceedings.[111] Conclusiveneess has been supported either on the ground of statutory provisions according finality to the assessment,[112] or on the ground of adequacy of direct appellate procedure.[113] Under the federal income tax scheme, on the other hand, a species of collateral attack has been made available in the form of statutory suits for refund of an allegedly erroneously assessed tax.[114]

Although state courts have followed the statutory lead in immunizing assessments against collateral attack, they have shown far less respect for legislative intention with respect to the power of taxing authorities to review their own determinations through the medium of reassessments. Statutes often provide broadly for the back assessment of property which has been omitted from, or has escaped, taxation.[115] Yet a reassessment on the ground of omissions or undervaluations with respect to an item of property in the taxpayer's return has usually been defeated on the somewhat amazing theory that the property in question has already been subject to levy, however inadequate.[116] Even a statutory provision for reassessment whenever the original levy was incorrect has been interpreted to authorize action only when the tax officials, subsequent to the original assessment, have been apprised of new facts.[117] Fraud sufficient to warrant the reopening of an assessment must involve actual collusion with government agents.[118] Deliberate failures to list

111. Braley v. City of Barre, 88 Vt. 251, 92 Atl. 236 (1914) (suit for refund). *Contra:* Kurn v. Board of County Comm'rs, 141 Kan. 7, 40 P. (2d) 321 (1935); Milheim v. Moffat Tunnel Dist., 262 U. S. 710 (1922) (injunction); Harrington v. Glidden, 179 Mass. 486, 61 N. E. 54 (1901) (suit by government); *In re* 168 Adams Bldg. Corp., 27 F. Supp. 247 (N. D. Ill. 1939) (77B proceedings).

112. Ford Motor Co. v. State, 178 Okla. 193, 62 P. (2d) 48 (1936).

113. State v. Jefferson County Bank, 200 Ala. 287, 76 So. 53 (1917).

114. 42 STAT. 311 (1921), 28 U. S. C. § 41(20) (1934). Attack by injunction is explicitly prohibited. REV. STAT. § 3224 (1885), 26 U. S. C. § 1543 (1934).

115. IOWA CODE (1939) § 7105.1; MISS. CODE ANN. (1930) § 3197.

116. Commonwealth v. J. M. Robinson, Norton & Co., 146 Ky. 218, 142 S. W. 405 (1912); Langhout v. First Nat. Bank, 191 Iowa 957, 183 N. W. 506 (1921). But *cf.* Adams v. Clarke, 80 Miss. 134, 31 So. 216 (1902).

Reassessment will be allowed where there has been a manifest clerical error in the original assessment. American Tobacco Co. v. Commonwealth, 162 Ky. 716, 172 S. W. 1085 (1915); State *ex rel.* Pacific Power & Light Co. v. Dep't of Pub. Works, 143 Wash. 67, 254 Pac. 839 (1927) (railroad valuation).

117. State *ex rel.* Schuster Realty Co. v. Lyons, 184 Wisc. 175, 197 N. W. 585 (1924).

118. Compare State *ex rel.* Tax Comm. v. Sinclair Prairie Oil Co., 171 Okla. 493, 41 P. (2d) 876 (1935) with Adams v. Clarke, 80 Miss. 134, 31 So. 216 (1902).

items of property or to report accurate valuations have not been deemed sufficiently reprehensible to overcome the presumption that the tax assessor had performed his duty of full investigation of the facts before determining the amount of the levy.[119] There seems to be even less inclination to allow reassessment where the error has been one of law.[120]

This judicial preference for conclusiveness apparently extends to the collection of every type of tax, whether levied on property, franchises, income or corporations.[121] It has prevailed, moreover, despite judicial recognition of the practical considerations which argue against any inflexible restrictions on the taxing power. It has been conceded that initial assessments are habitually hurried, that it is impossible adequately to check every return and that as a practical matter, assessors rely on information reported by the taxpayer.[122] But the annoyance and uncertainty experienced by the citizen under a practice of repeated assessments, especially when based solely on a changed view of the same facts, have proved the more persuasive factors.[123]

The federal income tax procedure differs from the state systems in that the original assessment is made by the taxpayer himself.[124] With its explicit provision for successive deficiency assessments,[125] the federal tax structure implies a complete abnegation of res judicata principles. Nevertheless, the prejudice against revision of a judgment once made has found expression in several federal cases. Two proceeded on a theory bearing full resemblance to the doctrine of res judicata.[126] Others (including the famous *Woodworth*

119. Commonwealth v. J. M. Robinson, Norton & Co., 146 Ky. 218, 142 S. W. 406 (1912).

120. Anniston City Land Co. v. State, 185 Ala. 482, 64 So. 110 (1913). But *cf.* Buick Motor Co. v. Milwaukee, 43 F. (2d) 385 (E. D. Wisc. 1930), *aff'd*, 48 F. (2d) 801 (C. C. A. 7th, 1931), *cert. denied*, 284 U. S. 655 (1931), in which the court imports some of the flexibility of the federal tax system into the state scheme.

121. State *ex rel.* Tax Comm. v. Sinclair Prairie Oil Co., 171 Okla. 498, 41 P. (2d) 876 (1935) (property); Coulter v. Louisville Bridge Co., 114 Ky. 42, 70 S. W. 29 (1902) (franchises); State *ex rel.* Ford Motor Co. v. Gehner, 325 Mo. 24, 27 S. W. (2d) 1 (1930) (income); Commonwealth v. Kentucky Heating Co., 176 Ky. 35, 195 S. W. 459, 180 Ky. 607, 203 S. W. 538 (1918) (corporations).

122. *Cf.* dissent in Miller v. Copeland's Estate, 139 Miss. 788, 812, 104 So. 176, 177 (1925), which argues also that permitting unlisted property to go untaxed is both unfair to other taxpayers and conducive to fraud.

123. Champlin v. Oklahoma Tax Comm., 163 Okla. 185, 20 P. (2d) 904 (1933). An additional consideration is the apparent injustice of permitting the government to reopen questions of tax liability while the taxpayer is concluded by his payment on the original assessment. Coulter v. Louisville Bridge Co., 114 Ky. 42, 70 S. W. 29 (1902).

124. In most state tax systems, all assessments are made by government officials. Tennessee Coal, Iron & R. R. Co. v. Board of Educ., 80 F. (2d) 307 (C. C. A. 5th, 1935).

125. 48 STAT. 740, 26 U. S. C. § 271 (1934). An erroneous refund may be collected either by a suit for its recovery [Talcott v. United States, 23 F. (2d) 897 (C. C. A. 9th, 1928)] or a subsequent deficiency assessment [Burnet v. Porter, 283 U. S. 230 (1931)].

126. Boyne City Lumber Co. v. Doyle, 47 F. (2d) 772 (W. D. Mich. 1930); Penrose v. Skinner, 298 Fed. 335 (D. Col. 1923).

v. Kales decision), although offering rationales that are difficult to unravel, appear to involve strong elements of estoppel.[127] Subsequent decisions, however, have strongly discredited these holdings.[128] Federal courts have seemingly recognized that the exigencies of income tax administration and the desirability of uniform taxation[129] prohibit the importation of a rule of conclusiveness. Since 1930, courts[130] and the Board of Tax Appeals[131] have consistently held that the Commissioner of Internal Revenue may reverse his determinations any time within the statute of limitations, and that reliance by the taxpayer to his prejudice on either formal rulings and action of the Commissioner's office[132] or informal advices by revenue agents,[133] will not support an estoppel against tax liability. Informal compromises of tax liability are similarly ineffectual, inasmuch as the prescribed statutory procedure for formally settling tax claims has been deemed exclusive.[134]

127. Woodworth v. Kales, 26 F. (2d) 178 (C. C. A. 6th, 1928), *cert. denied*, 280 U. S. 570 (1928); United States v. Detroit Steel Prod. Co., 20 F. (2d) 675 (E. D. Mich. 1927).

128. The Kales case has never been squarely overruled, inasmuch as it arose out of a unique controversy. The practice of anticipatory tax determinations involved had long since been discontinued when the *Kales* case came to court. *Cf.* James Couzens, 11 B. T. A. 1040 (1928). Section 801(a) of the Revenue Act of 1938, however, provides for binding closing agreements as to future tax liabilities. 52 STAT. 573 (1938), 26 U. S. C. § 3760(a) (Supp. 1939).

129. Reopening of assessments is necessary to allow subsequent judicial and administrative decisions to be applied to all similarly situated taxpayers. *Cf.* United States v. Tuthill Spring Co., 55 F. (2d) 415 (N. D. Ill. 1931); Alex T. Sokolow, 22 B. T. A. 349 (1931).

130. Burnet v. Porter, 283 U. S. 230 (1931); Stanford Univ. Book Store v. Helvering, 83 F. (2d) 710 (App. D. C. 1936). The changed determination may involve a revaluation on the same facts. Levy v. Commissioner of Int. Rev., 48 F. (2d) 725 (C. C. A. 9th, 1931).

Where, however, federal tax statutes are silent on the subject of the Commissioner's control over his determinations, federal courts have reverted to their res judicata leanings. It has been stated that so long as the Commissioner is confronted by the same facts, he will not be allowed to reverse his discretionary judgment as to whether a statutory special assessment shall be granted. Austin Co. v. Commissioner of Int. Rev., 35 F. (2d) 910, 912 (C. C. A. 6th, 1929), *cert denied*, 281 U. S. 735 (1930); Page v. Lafayette Worsted Co., 66 F. (2d) 339 (C. C. A. 1st, 1933), *cert. denied*, 290 U. S. 692 (1933).

131. Barbara Archer, 37 B. T. A. 299 (1938); Southern Md. Agric. Fair Ass'n, 40 B. T. A. No. 86 (1939).

132. Harriton v. Lucas, 41 F. (2d) 429 (App. D. C. 1930) (question of substantive obligation); Esperson v. Commissioner of Int. Rev., 49 F. (2d) 259 (C. C. A. 5th, 1931), *cert. denied*, 284 U. S. 658 (1931) (question of administrative practice). But *cf.* Helvering v. R. J. Reynolds Tobacco Co., 306 U. S. 110 (1939), cited *infra* note 230.

133. Darling v. Commissioner of Int. Rev., 49 F. (2d) 111 (C. C. A. 4th, 1931), *cert. denied*, 283 U. S. 866 (1931).

134. L. Loewy & Sons v. Commissioner of Int. Rev., 31 F. (2d) 652 (C. C. A. 2d, 1929). But *cf.* American Oil & Ref. Co. v. Kincannon, 154 Okla. 129, 3 P. (2d) 877 (1931) (workmen's compensation).

LICENSING TRIBUNALS

The action of state licensing agencies has uniformly been held to be conclusive against collateral attack. A problem of this nature arises when, in a prosecution for acting without a license, the defense is interposed that the license had illegally been refused. Whether or not the criteria for the issuance of a license necessitated the exercise of discretion, there has been apparently little dissent from the rule that a defense of this nature is unavailing,[135] because there is an adequate and exclusive remedy by mandamus.[136] No distinction has been made between errors of fact or of law in the mistaken refusal to grant the license.[137] The same result has been reached even where the denial of a license was based on an unconstitutional section of a statute, provided that the entire statute was not thereby rendered invalid.[138]

An initial rejection of an application for a license has, with equal uniformity, been regarded by state courts as precluding a contrary decision on a subsequent application based on a record substantially identical with that formerly presented.[139] It has been stated explicitly that the licensing tribunal will not be permitted a second time to weigh private interests against the claims of public convenience and welfare.[140] A radically different approach was enunciated in the recently decided *Pottsville* case,[141] involving not only the relationship between the Federal Communications Commission and the reviewing Court of Appeals for the District of Columbia,[142] but the extent to which the Commission should be governed by its former action.[143] The Supreme Court was unequivocal in its declaration that, since the Commission was primarily an instrument of public control rather than a tribunal for the

135. Phoenix Carpet Co. v. State, 118 Ala. 143, 22 So. 627 (1887); Montpelier v. Mills, 171 Ind. 175, 85 N. E. 6 (1908). *Contra:* Fossett v. Rock Island Lumber Mfg. Co., 76 Kan. 428, 92 Pac. 833 (1907).

136. The defense of an illegal refusal to license can not be raised in a suit to enjoin the unlicensed activity. New York v. O. J. Gude Co., 122 App. Div. 741, 107 N. Y. Supp. 484 (2d Dep't 1907).

137. Montpelier v. Mills, 171 Ind. 175, 85 N. E. 6 (1908) (error of fact); Commonwealth v. McCarthy, 225 Mass. 192, 114 N. E. 287 (1916) (error of law).

138. State v. Stevens, 78 N. H. 268, 99 Atl. 723 (1916); Lipkin v. Duffy, 118 N. J. L. 84, 191 Atl. 288 (1937).

139. Cardinal Bus Lines v. Consolidated Coach Corp., 254 Ky. 586, 72 S. W. (2d) 7 (1934); People *ex rel.* Swedish Hospital v. Leo, 120 Misc. 355, 198 N. Y. Supp. 397 (Sup. Ct. 1923), *aff'd*, 215 App. Div. 696, 212 N. Y. Supp. 897 (1925).

140. Little v. Board of Adjustment, 195 N. C. 793, 143 S. E. 827 (1928); McGarry v. Walsh, 213 App. Div. 289, 210 N. Y. Supp. 286 (2d Dep't 1925).

141. F.C.C. v. Pottsville Broadcasting Co., 60 Sup. Ct. 437 (U. S. 1940).

142. It was held that the Commission was not under the same obligation to follow a mandate of the Court of Appeals that a lower federal court would be.

143. The decision also involves a holding that the action of the Commission in granting an application independent consideration will not preclude the Commission from later subjecting the application to the competition of other applications afterward received.

adjudication of private rights, considerations of effective enforcement of the statutory policy eclipsed ordinary rules of judicial litigation.[144] Erroneous action by an administrative agency will thus not be regarded as foreclosing it from effectuating the legislation committed to its charge.[145] To be compared with the *Pottsville* doctrine is the holding in *United States* ex rel. *Strachey v. Reimer* that a United States consul might not revoke a visa after an alien, in reliance on the visa, had embarked on his voyage, even though subsequent investigation by the consul indicated that the alien was ineligible for admission to this country.[146] The irreparable prejudice which would have resulted from a contrary holding, constituted an equitable element with which the uncompromising pronouncements in the *Pottsville* case had not been obliged to cope. Furthermore, the claims of the individual to certainty of status and to freedom from continual vexation, which frequently demand recognition in problems facing other federal agencies, make it probable that the *Pottsville* viewpoint will not receive universal application.

The Securities and Exchange Commission, for instance, has apparently decided that the balance of policy is tipped in favor of protecting private action which follows a prior determination. This was indicated in the Commission's refusal to reverse a concededly incorrect prior finding of security exemption after the securities had been issued on the basis of the exemption order.[147] The Commission has held, on the other hand, that its preliminary orders consenting to the amendment of a registration statement will not bar it from finding in a later stop-order proceeding that the statement or amendment contained material misrepresentation.[148]

The question of the conclusiveness of licensing agency determinations in independent proceedings is of particular interest in view of the provisions of the Securities Act of 1933 allowing civil suits by security purchasers on the same grounds of deficiency in a registration statement that afford the basis for an SEC stop order.[149] At first blush, it would seem that a private indi-

144. *Cf.* Brougham v. Blanton Mfg. Co., 249 U. S. 495 (1919), holding that the Government control established under the meat inspection statutes was not exhausted by an original exercise, and that, accordingly, approval of a trade name could be revoked although it had been employed in business for several years. There had been, however, considerable change of circumstance between the two decisions.

145. See 60 Sup. Ct. at 442 (U. S. 1940).

146. 101 F. (2d) 267 (C. C. A. 2d, 1939).

147. *In re* the Application of Intern'l Paper & Power Co., 2 S. E. C. 792 (1937). In other situations, however, the Commission has not hesitated to issue a stop order after the securities issue in question has been completely marketed. *In re* Oklahoma-Texas Trust, 2 S. E. C. 764 (1937).

148. Consent to a post-effective amendment merely involved a finding that the amendment contained no apparent inaccuracies on its face. Matter of Bankers Union Life Co., 2 S. E. C. 63 (1937). An order accelerating a pre-effective amendment is only an administrative act which cannot constitute a quasi-judicial determination that the registration statement was free of deficiencies. Matter of Breeze Corp., 3 S. E. C. 709 (1938).

149. Compare § 8(d) 48 STAT. 79, 15 U. S. C. § 77h(d) (1934) with § 11(a) 48 STAT. 82, 15 U. S. C. § 77k(a) (1934).

vidual could not take advantage of findings in a license revocation proceeding to which he was not a party.[150] Yet there is some judicial authority for the proposition that a party who has fully litigated an adjudication will be bound by it in a later controversy with a non-party.[151] There have been frequent instances, moreover, in which administrative determinations have been given an *in rem* effect.[152] Thus, the revocation of a liquor license for violation of a statute has been held conclusive of that issue in a subsequent suit on the licensee's bond.[153] Security issuers, however, frequently consent to the issuance of a possibly unwarranted stop order, finding it more expedient to amend their registration statements than to engage in litigious hearings before the SEC. Courts will therefore probably be reluctant to hold a stop order with a history of this character binding on the issuer in a later private controversy.

National Labor Relations Board

Problems of the conclusiveness of prior determinations arise at many points in the ramified Labor Board procedure. Of major importance is the question presented by a second proceeding on the same charges, the earlier proceeding having failed for some reason to produce an enforceable order. A fairly close analogue to the Labor Board proceedings may be found in hearings before various administrative bodies relative to the dismissal of officers on charges. Whatever action is taken has generally been held to constitute res judicata, both as to the administrative agency itself[154] and on collateral attack.[155] The Labor Board, however, has thus far declined to

150. It was so held in Royce v. Rosasco, 159 Misc. 236, 287 N. Y. Supp. 692 (Sup. Ct. 1936). Where, however, there is no problem of failure of identity of parties, as on a subsequent application for a different license by the same party, it seems clear that the licensing board, barring changed circumstances, will be bound by its original findings. Watkins v. State Bd. of Pharmacy, 170 Miss. 26, 154 So. 277 (1934).

151. Coca-Cola Co. v. Pepsi-Cola Co., 172 Atl. 260 (Del. Sup. Ct. 1934).

152. Thus, the administrative determination of the public utility status of a water company will bind non-parties in a subsequent action. Goodspeed v. Great Western Power Co., 33 Cal. App. (2d) 245, 91 P. (2d) 623 (1939). The same has been held with respect to workmen's compensation awards. Slattery v. Board of Est. & Apport. 271 N. Y. 346, 3 N. E. (2d) 505 (1936). *Contra:* Williams v. Southern Pac. Co., 54 Cal. App. 571, 202 Pac. 356 (1921). And a party who has litigated an issue in compensation proceedings will be bound in a later controversy with a non-party. Biederzycki v. Farrel Foundry & Mach. Co., 103 Conn. 701, 131 Atl. 739 (1926); Sampson v. Michigan Copper & Brass Co., 274 Mich. 592, 265 N. W. 472 (1936).

153. State v. Corron, 73 N. H. 434, 62 Atl. 1044 (1905).

154. Lilienthal v. Wyandotte, 286 Mich. 604, 282 N. W. 837 (1938) (attempted dismissal after original quashing of charges); Hyland v. Waldo, 158 App. Div. 654, 143 N. Y. Supp. 901 (1st Dep't 1913) (attempted reversal of dismissal).

155. Queen v. Atlanta, 59 Ga. 318 (1877); Derrick v. Gaston School Dist., 172 S. C. 472, 174 S. E. 431 (1934). Both cases involved suits for salary for a period following the dismissal. But *cf.* State *ex rel.* Plunkett v. Miller, 162 Miss. 149, 137 So. 737 (1931).

commit itself on the consequences of dismissing a complaint after hearing.[156] True, the Board has denied that the constitutional prohibition against double jeopardy has application to its proceedings, which are legally non-criminal in character.[157] And, in at least one opinion dismissing a complaint, the statement was made that new evidence might warrant another complaint on the same facts.[158] On several occasions, however, a plea of res judicata has been denied on the ground that the particular situation lay outside the rule.[159] But there has been no forthright statement that res judicata is totally inapplicable. The Board, moreover, has been careful at times to indicate that the dismissal of a complaint was without prejudice.[160]

The circuit courts of appeal, however, have apparently proceeded on the definite theory that exoneration of a respondent may bar further enforcement action. Thus, while the Board has been allowed to reinstate a complaint it dismissed after hearing but without prejudice, the argument by which the court reached this result left no doubt that the reservation of jurisdiction was considered a crucial factor.[161] In another case, a circuit court of appeals was deliberately explicit in dismissing a portion of a complaint "with prejudice."[162] It should be noted, however, that the function of the Labor Board is primarily to guard the national economic welfare, and only incidentally to vindicate private interests.[163] The Board would therefore seem to be the type of agency that fits into the rationale of the *Pottsville* case, and should thereby be free of the confinements of the res judicata principle.

In situations other than a second proceeding on the same charges, however, the Board itself has found it expedient to attach varying degrees of conclusiveness to several of its determinations. A finding in a complaint proceeding that a union was company dominated was deemed so far to conclude the question that in subsequent complaint or certification proceedings no evidence was received on that issue.[164] Similarly, where an appropriate unit was designated in a certification proceeding, new evidence on the unit issue that

156. The Board has firmly announced that the withdrawal of charges or the dismissal of a complaint before hearing on the merits will not serve *per se* as the basis for a plea of res judicata. Ingram Mfg. Co., 5 N. L. R. B. 908 (1938); Shuron Optical Co., 11 N. L. R. B. 859 (1939).

157. Halff Mfg. Co., 16 N. L. R. B. No. 68, p. 16 (1939).

158. American-Hawaiian S. S. Co., 6 N. L. R. B. 678, 684 (1938).

159. Shuron Optical Co., 11 N. L. R. B. 859 (1939); Halff Mfg. Co., 16 N. L. R. B. No. 68 (1939).

160. Ferguson Brothers Mfg. Co., 9 N. L. R. B. 189 (1938).

161. C. G. Conn v. N. L. R. B., 108 F. (2d) 390 (C. C. A. 7th, 1939).

162. Semet-Solvay Co. v. N. L. R. B., 100 F. (2d) 1020 (C. C. A. 6th, 1938).

163. See the preamble to the National Labor Relations Act. 49 STAT. 449 (1935), 29 U. S. C. § 151 (Supp. 1939). The rules of the Board provide that a complaint may not be dismissed or charges withdrawn without the Board's consent. N. L. R. B. RULES AND REGULATIONS II § 1 (1939).

164. Pittsburgh Plate Glass Co., 15 N. L. R. B. 515 (1939); Kansas City Structural Steel Co., 18 N. L. R. B. No. 45 (1940).

could reasonably have been presented earlier was rejected in a later complaint proceeding.[165] The Board has laid down the further rule that the certification of a union as exclusive bargaining agent precludes another certification within a year,[166] unless some striking change of circumstances indicates that the existing certification has become outdated.[167] Nevertheless, the dismissal of a certification petition will not bar a reopening,[168] nor is there any obstacle to setting aside a certification order on a rehearing when new evidence is presented.[169]

Res judicata, it has been stated, does not in any manner prevent modification of a bargaining unit designation.[170] Reconsideration of a unit determination has been allowed for new evidence,[171] and alteration of a determination has been made whenever changes in conditions so warranted.[172] Unit determinations, however, although contrary to established rules, have not been disturbed unless demonstrated to be unsatisfactory.[173]

Owing to the stipulation in the NLRA that the Board shall have exclusive jurisdiction over questions arising under it,[174] the relationship between the Labor Board and the courts is far from clear. It can scarcely be doubted that a judicial determination will ordinarily control subsequent administrative action, whenever the factual requisites for res judicata exist.[175] The Board, however, has been adamant in its stand that it is not bound by a legal or

165. Pittsburgh Plate Glass Co., 15 N. L. R. B. 515 (1939). But the certification of a union as exclusive bargaining agent is no bar to a finding in subsequent complaint proceedings that the union is company-dominated. McKesson & Robbins, Inc., 19 N. L. R. B. No. 85 (1940).

166. American Hair & Felt Co., 15 N. L. R. B. 572 (1939); *cf.* Todd Johnson Dry Docks, 10 N. L. R. B. 629 (1938). A state labor board has seen fit to adopt a similar policy. *In re* Reich-McJunkin Dairy Co., 5 LAB. REL. REP. 19 (Pa. L. R. B. 1939).

167. International Nickel Co., 19 N. L. R. B. No. 94 (1940) (hiring of a large number of additional employees).

168. Todd Johnson Dry Docks, 10 N. L. R. B. 629 (1938).

169. American-Hawaiian S. S. Co., 6 N. L. R. B. 678 (1938).

170. Pacific Greyhound Lines, 9 N. L. R. B. 557 (1938). A union which had petitioned for and received a designation as bargaining agent on the basis of an industrial unit is not precluded from thereafter being certified as bargaining agent for a smaller unit. Jones Lumber Co., 12 N. L. R. B. 209 (1939).

Board Member Leiserson, however, has dissented from this asserted freedom of action, arguing that it renders stable collective bargaining impossible and interferes with rights established in designated units. Bendix Products Corp., 15 N. L. R. B. 965, 971 (1939).

171. Federated Fishing Boats of N. E. & N. Y., 15 N. L. R. B. 1080 (1939).

172. Chrysler Corp., 17 N. L. R. B. No. 64 (1939) (unexpected election results); Ryan Aeronautical Co., 15 N. L. R. B. 812 (1939) (advancements in stage of organization).

173. Bendix Products Corp., 15 N. L. R. B. 965 (1939). The original unit designation adhered to ran counter to the Globe doctrine. *Cf.* American Can Co., 13 N. L. R. B. 1252 (1939).

174. § 10(a), 49 STAT. 453 (1935), 29 U. S. C. § 160(a) (Supp. 1939). See (1939) 53 HARV. L. REV. 301, (1938) 32 ILL. L. REV. 353.

175. People *ex rel.* Warren v. Carter, 119 N. Y. 557, 23 N. E. 926 (1890). But *cf.* State *ex rel.* Matson v. O'Hern, 104 Mont. 126, 65 P. (2d) 619 (1937).

equitable adjudication of the validity of a collective bargaining contract.[176] In addition to arguing that the action of no other tribunal can oust its exclusive jurisdiction, the Board has pointed out that there is complete failure of identity of both parties and issues between judicial and Labor Board proceedings.[177] The only effect accorded a judicial declaration that a labor contract was valid has been to relieve the employer from back pay obligations for the period during which the declaration remained uncontradicted by the Board.[178] That this practice of the Board receives judicial sanction was indicated by the decision in the *M. & M. Woodworking Co.* case,[179] in which the Ninth Circuit Court of Appeals, although faced with the Board's refusal to follow a finding in a prior injunction decree,[180] refrained from criticizing this action.

Labor Board orders impose no legal obligation on an employer until accorded enforcement by a circuit court of appeals.[181] The problem of collateral attack, accordingly, can not arise.[182] The weight which will be given to Labor Board determinations in private actions, however, is an important, albeit an open, question. Despite the impotence of a naked Board order, a state court has announced that the Board's finding as to illegal discharge and employment status would be controlling in private litigation.[183] This attitude seems amply justified by the fact that the Board has exclusive statutory jurisdiction over such issues. But whatever the status of a Labor Board order growing out of complaint proceedings, it seems a certification order is of far less dignity. Theoretically it is no more than an inconclusive statement of the results of an investigation,[184] and has been authoritatively said in no way to affect private rights and duties under the Labor Act.[185] But a federal court has held a Labor Board certification conclusive on the issue of repre-

176. Mason Mfg. Co., 15 N. L. R. B. 295 (1939) (suit to enjoin picketing); National Elect. Prod. Co., 3 N. L. R. B. 475 (1937) (suit for specific performance of closed shop contract).

177. South Atlantic S. S. Co., 12 N. L. R. B. 1367 (1939).

178. Hill Bus Co., 2 N. L. R. B. 781 (1937).

179. M. & M. Woodworking Co. v. N. L. R. B., 101 F. (2d) 938 (C. C. A. 9th, 1939).

180. M. & M. Woodworking Co., 6 N. L. R. B. 372 (1938).

181. § 10(e), 49 STAT. 453 (1935), 29 U. S. C. § 160(e) (Supp. 1939).

182. The problem, however, is likely to arise under the F. T. C. Act of 1938, 52 STAT. 113, 114 (1938), 15 U. S. C. § 45(g)(h) (Supp. 1939), under which Commission orders are final and enforceable unless appealed from within a specified period. The F. T. C. is otherwise procedurally comparable to the N. L. R. B. See (1939) 39 COL. L. REV. 259, 270, (1940) 34 ILL. L. REV. 626.

183. Coldiron v. Good Coal Co., 276 Ky. 833, 837, 125 S. W. (2d) 757, 760 (1939). But *cf.* Proper v. John Bene & Sons, 295 Fed. 729 (E. D. N. Y. 1923), holding an F. T. C. order made under the original Commission procedure inconclusive in a later private action.

184. See note 60 *supra.*

185. Fedders Mfg. Co., 7 N. L. R. B. 817 (1938); *cf.* American Fed. of Labor v. N. L. R. B., 60 Sup. Ct. 300 (U. S. 1940). But *cf.* Pittsburgh Plate Glass Co., 15 N. L. R. B. 515 (1939).

sentation in a suit to enjoin picketing.[186] This conclusion, however, is not likely to be followed, since it would leave an allegedly minority union legally bound by a Board order from which it had no opportunity for judicial relief.[187]

While recognizing the doctrine that the acts of its officers can not estop the Government in its enforcement of a statute,[188] the Labor Board has adhered to the position that the policies of the Act will be best effectuated by refusal to go behind its subordinates' actions and representations on which reliance has been placed.[189] A settlement agreement, for example, in which an employer and a board agent participate,[190] and which is duly observed by the employer,[191] has been held effectively to compromise all unfair practices up to the date of settlement.[192] This position has been adhered to even where the Board agent clearly erred in interpreting the Labor Act.[193] The SEC, on the contrary, has declined to be bound by an issuer's reliance on the erroneous advice of a subordinate, and has been sustained in this position by the courts.[194] It is probable that the Labor Board's more precarious political position, and its greater need for securing the cooperative confidence of the group which it regulates, accounts for this difference in practice.

Railroad Commissions

The ICC, from its earliest decisions, has vigorously asserted the freedom of its reparations orders from the technical legal rules of res judicata and stare decisis.[195] This position, grounded on the Commission's statutory

186. Oberman Co. v. United Garment Workers of America, 21 F. Supp. 20 (W. D. Mo. 1937). A state labor board, on the contrary, has declined to accept as conclusive the N. L. R. B.'s determination of the nature of the commerce in which an employer was engaged. *In re* Union Premier Food Stores, 5 Lab. Rel. Rep. 299 (Pa. L. R. B. 1939).

187. American Fed. of Labor v. N. L. R. B., 60 Sup. Ct. 300 (U. S. 1940).

188. See cases cited notes *227* and *228 infra*.

189. Shenandoah-Dives Mining Co. v. International Union of Mine, Mill & Smelter Workers, 11 N. L. R. B. 885 (1935) (unfair practice charges); Willys Overland Motors, Inc., 15 N. L. R. B. 864 (1939) (bargaining unit determination).

190. The Board does not deem itself bound by a settlement in which its agents did not participate. Horace G. Prettyman, 12 N. L. R. B. 640 (1939).

191. A settlement agreement which is not observed by an employer does not, of course, control the Board. Halff Mfg. Co., 16 N. L. R. B. No. 68 (1939); United Carbon Co., 7 N. L. R. B. 598 (1938) (consent election).

192. Godchaux Sugars, Inc., 12 N. L. R. B. 568 (1939). Events which occurred before a settlement, however, may be considered as evidence giving color to acts subsequent to the settlement. Allsteel Products Mfg. Co., 16 N. L. R. B. No. 12 (1939).

193. American-Hawaiian S. S. Co., 6 N. L. R. B. 678 (1938).

194. S. E. C. v. Torr, 22 F. Supp. 602 (S. D. N. Y. 1938). Where the issuer had ceased the practices he had been advised were legal, however, no injunction was granted. S. E. C. v. Torr, 87 F. (2d) 446 (C. C. A. 2d, 1937).

195. Waco Freight Bureau v. Houston & T. C. R. R., 19 I. C. C. 22 (1910); Froeber-Norfleet, Inc. v. Southern Ry., 190 I. C. C. 364 (1932); see Comment (1936) 34 Mich. L. Rev. 672. The Commission's rules establishing a time limit for a reopening may be waived by the Commission. Wilbur Lumber Co. v. Director General, 151 I. C. C. 759 (1929).

authority to modify any of its orders at any time, has been sustained by the federal courts.[196] This point of view is eminently fair, for a contrary rule would lead to unjust inequalities of transportation costs among shippers in identical positions.[197] On the other hand, the Commission has found it politic to adhere to a previous conclusion unless, at the second hearing, new facts are adduced, a showing of materially changed conditions is made or it is manifest that the Commission had previously acted under a misapprehension.[198] An award may thus be based solely on the record in a previous case.[199]

The preceding paragraph has application only to situations in which the initial reparations order followed the shipments for which reparations were sought. Where the shipments in question moved subsequent to a commission order involving the rate charged, a different set of rules may govern. The *Arizona Grocers* case enunciated the doctrine that where the rate charged had been set by the Commission itself, the Commission was devoid of power to order reparations.[200] Three grounds were advanced for the decision: the commission could not ignore its prior determination of reasonableness; reliance by the carrier on the rate set should be protected; and the ascertainment of a rate was a quasi-legislative act which, having the effect of a statute, controlled the quasi-judicial act of awarding reparations. The decision, however, left several questions open. Although it held that no new evidence could be considered on the question of reasonableness, it did not touch on the problem presented by a radical change of conditions between the date the rate was set and the date of the shipments for which reparations were sought.[201] Again, although the opinion stated that commission approval of a rate set by the carrier would have an equally binding effect, there was no indication of the form such approval must take. There is some indication in the cases following the *Arizona Grocers* decision that the approval of rates implicit

196. Froeber-Norfleet v. Southern Ry., 9 F. Supp. 409 (N. D. Ga. 1934).

197. *Ibid.* Comparison may be made to the similar problems arising under the federal tax statutes. See note 129 *supra.*

198. Traugott Schmidt & Sons v. Michigan C. R. R., 23 I. C. C. 684 (1912); Traffic Bureau of Nashville v. Louisville & N. R. R., 43 I. C. C. 366 (1917).

199. Pacific Mutual Door Co. v. Ann Arbor R. R., 101 I. C. C. 633 (1925).

200. Arizona Grocery Co. v. Atchison, T. & S. F. Ry., 284 U. S. 370 (1932), (1932) 41 YALE L. J. 625. This rule, however, has no constitutional basis. Great Northern Ry. v. Sunburst Oil & Ref. Co., 287 U. S. 358 (1932). It is immaterial that a shipper seeking reparations was not a party to the rate proceeding. Arizona Wholesale Grocery Co. v. Southern Pac. Co., 68 F. (2d) 601 (C. C. A. 9th, 1934).

201. In Arizona Wholesale Grocery Co. v. Southern Pac. Co., 68 F. (2d) 601 (C. C. A. 9th, 1934), no consideration was given to a possible change in conditions although the reparations claim was made eight years after the initial rate proceeding had been held. But *cf.* Pitzer Transfer Corp. v. Norfolk & W. Ry., 10 F. Supp. 436 (D. Md. 1935). But there is agreement that a commission-made rate which has been raised under a blanket increase will not be conclusive. Texas & P. Ry. v. Louisiana Oil Ref. Corp., 76 F. (2d) 465 (C. C. A. 5th, 1935), *cert. denied,* 295 U. S. 767 (1935).

in any denial of reparations will be sufficient to conclude the commission. In the *Second Arizona* and *El Paso* cases,[202] the complaint in the earlier commission proceeding had attacked the existing rates as unreasonable and demanded reparations, but the Commission had found that the record compiled did not support a finding of unreasonableness. Yet this finding was held a sufficient affirmative approval to bring into play the *Arizona Grocers* rule. Other decisions, on the contrary, have emphasized the distinction between rates initiated by the Commission and those initiated by the carrier, and have held the *Arizona Grocers* doctrine applicable only to the former.[203]

The *Second Arizona* and *El Paso* cases represent an unfortunate extension of the original holding which contemplated a rate made by the Commission itself on what the Commission felt was an adequate record. In the *Second Arizona* and *El Paso* situations, the original record had been compiled by the parties alone,[204] and the Commission had declined to take affirmative action on inadequate information. Apart from any extension of the rule, the *Arizona Grocers* doctrine itself is open to severe criticism. It destroys the flexibility of the ICC's system, under which the reasonableness of rates was subject to the practical test of experience.[205] Moreover, if no leeway is to be allowed for changes in conditions, the rule necessitates a constant reexamination of rates, a process in which the carrier will ordinarily have a significant advantage over the shipper by virtue of its superior knowledge of fluctuating transportation costs. Finally, the statute explicitly contemplates an imbalance of remedies in favor of the shipper by allowing him to recover reparations without affording corresponding relief to the carrier.[206] These factors are not offset by considerations of protecting reliance. There is nothing to indicate that a railroad, in determining dividend payments, extension of service or capital investment, relies more on Commission-made rates than on self-initiated rates.

The numerous decisions relating to the problem under state railroad regulation schemes are in almost unanimous accord with the result in the *Arizona Grocers* case. Inasmuch as these cases are based on divergent statutory provisions, however, most of them cannot be regarded as exact equivalents of the *Arizona Grocers* decision. In some instances, the statutory system makes

202. Arizona Wholesale Grocery Co. v. Southern Pac. Co., 68 F. (2d) 601 (C. C. A. 9th, 1934) El Paso & S. W. R. R. v. Phelps-Dodge Merc. Co., 75 F. (2d) 873 (C. C. A. 9th, 1935). Neither decision regarded as significant whether this "affirmative approval" followed a request that a rate be set for the future or merely a request for reparations.

203. Jones v. Alton & S. R. R., 6 F. Supp. 807 (E. D. Ill. 1934); Pitzer Transfer Corp. v. Norfolk & W. Ry., 10 F. Supp. 436 (D. Md. 1935).

204. This is the case in most reparations and rate proceedings. See 4 SHARFMAN, THE INTERSTATE COMMERCE COMMISSION (1937) 198. The Commission, however, reserves the right to obtain additional evidence. *Ibid.*

205. See concurring opinion in Eagle Cotton Co. v. Southern Ry., 51 F. (2d) 443, 445, *cert. denied*, 284 U. S. 675 (1931).

206. 24 STAT. 383 (1887), 49 U. S. C. § 13(1) (1934).

no provision for reparations and actions, either in court or before the state commission, for refund of allegedly excessive charges have been held bad as a collateral attack on the established rates.[207] In other instances, reparations are authorized for charges in excess of the established rates, and specification of this ground has been held implicitly to exclude the power to award reparations for unreasonable rates.[208] Further, although commissions, as a practical matter, give only routine approval to submitted tariffs, the fiction has been indulged that all rates are commission made.[209] Consequently, the rates have been regarded as proof against retroactive change, on the theory either that they were res judicata or that they had the effect of legislation.[210] Where the statute authorizes reparations for unreasonable rates, approximating the situation under the federal act, the courts have divided.[211]

Under all statutes, state courts have made much of the fact that the carrier was legally obligated to charge the published rate, arguing that it would be unjust to penalize the carrier for so doing.[212] Again, it has been claimed that permitting the award of reparations means discrimination in favor of the shippers who get them, and even among such shippers where numerous state courts would be handling the individual reparations claims.[213] The fundamental legislative purpose, it has further been urged, is to secure fixed rates which will enable both shipper and carrier to do business on a basis of certainty.[214] It has been conceded, however, that railroad commissions do not and cannot investigate every rate in every tariff filed for its approval, and that the prevailing rule requires constant rate revision to do justice to all

207. E. L. Young Heading Co. v. Payne, 127 Miss. 48, 89 So. 782 (1921) (court suit); Great Western Portland Cement Co. v. Pub. Serv. Comm., 121 Kan. 531, 247 Pac. 881 (1926) (commission proceeding).

208. Montana Horse Products Co. v. Great Northern Ry., 91 Mont. 194, 7 Pac. (2d) 919 (1932) (court action); Texas & P. Ry. v. Railroad Comm., 137 La. 1059, 69 So. 837 (1915) (commission proceeding).

209. Missouri-K. & T. Ry. v. Railroad Comm., 3 S. W. (2d) 489 (Tex. Civ. App. 1928), *aff'd*, Producers Ref. Co. v. Missouri-K. & T. Ry., 13 S. W. (2d) 679, 680 (Tex. Comm. App. 1930); Mathieson Alkali Works v. Norfolk & W. Ry., 147 Va. 426, 137 S. E. 608 (1927).

210. Producers Ref. Co. v. Missouri, K. & T. Ry., 13 S. W. (2d) 679 (Tex. Comm. App. 1930) (res judicata); Montana Horse Products Co. v. Great N. Ry., 91 Mont. 194, 7 P. (2d) 919 (1932) (effect of legislation).

211. Northern P. Ry. v. Dep't of Pub. Works, 136 Wash. 389, 240 Pac. 362 (1925) (reparations order may not be inconsistent with previously established rate). *Contra:* Bonfils v. Public Util. Comm., 67 Colo. 563, 189 Pac. 775 (1920).

212. St. Louis-S. F. Ry. v. State, 155 Okla. 236, 8 Pac. (2d) 744 (1932); Northern P. Ry. v. Dep't of Pub. Works, 136 Wash. 389, 240 Pac. 362 (1925). *Contra:* Bonfils v. Public Util. Comm., 67 Colo. 563, 189 Pac. 775 (1920).

213. Jeremy Fuel & Grain Co. v. Public Util. Comm., 63 Utah 392, 226 Pac. 456 (1924); Montana Horse Products Co. v. Great N. Ry., 91 Mont. 194, 7 P. (2d) 919 (1932).

214. T. R. Miller Co. v. Louisville & N. R. R., 207 Ala. 253, 92 So. 797 (1922); E. L. Young Heading Co. v. Payne, 127 Miss. 48, 89 So. 782 (1921).

interests.[215] But here again the preponderance of judicial opinion is that stability of administrative action is preferable to flexibility and accuracy.

Contrary to this rule of conclusiveness, courts, anxious to protect railroads from confiscatory rate regulation, have erected the rule that valuation and other preliminary orders of railroad commissions are not res judicata.[216] The theory seems to be that since the preliminary order may not be reviewed on the constitutional issue of confiscation, it is not conclusive of that issue when it is later raised.[217] ICC valuation orders, it may be noted, have been declared by statute to be only prima facie evidence in succeeding rate proceedings.[218] But the effect of other ICC preliminary orders and determinations of status is far from clear. Originally, all such orders had neither of the logically connected attributes of reviewability and conclusiveness.[219] But the *Rochester* case declared that most of the hitherto unreviewable orders would thenceforth be reviewable.[220] And *Shields v. Utah Idaho Central R. R.* held that even those ICC orders not directly reviewable would be deemed binding.[221] Probably, then, the principle of res judicata will be applied to all such determinations.

Administrative Rulings and Regulations

The *Arizona Grocers* case and the other retroactive rate change cases, as contrasted with most of the other res judicata problems so far discussed, raise the cognate problem of the protection which will be given private action which follows and is based upon pronouncements of government officials or agencies. Section 19a of the Securities Act of 1933 provides that there shall be no liability for compliance in good faith with any rule or regulation of the SEC, even though that rule is later abrogated or judicially invalidated. This principle, however, apparently extending to both private suits and criminal prosecutions, is relatively new to the law.[222] It appears to be settled that, although

215. See cases cited note 209 *supra.*

216. New York C. R. R. v. New York & Pa. Co., 271 U. S. 124 (1926); New York Tel. Co. v. Maltbie, 291 U. S. 645 (1934); see Sholley, *Washington Public Utility Legislation of 1933: Budget Orders as Res Judicata* (1935) 10 Wash. L. Rev. 1.

217. Van Wert Gaslight Co. v. Public Util. Comm., 299 Fed. 670 (S. D. Ohio 1924). On the other hand, it has been argued that because preliminary orders are not res judicata, they can not be confiscatory. State Corp. Comm. v. Wichita Gas Co., 290 U. S. 561 (1934).

218. United States v. Los Angeles & S. L. R. R., 273 U. S. 299 (1927).

219. United States v. Griffin, 303 U. S. 226 (1938); Compare Piedmont & N. Ry. v. United States, 280 U. S. 469 (1930) with Piedmont & N. Ry. v. I. C. C., 286 U. S. 299 (1932).

220. Rochester Tel. Corp. v. United States, 307 U. S. 125 (1939), (1939) 48 Yale L. J. 1257, 53 Harv. L. Rev. 98.

221. 305 U. S. 177 (1938).

222. It has deservedly received wide acclaim from commentators. See Cook, *Certainty in the Construction of the Law* (1935) 21 A. B. A. J. 19; Oliphant, *Declaratory Rulings* (1938) 24 A. B. A. J. 7 (1938); Comment (1936) 45 Yale L. J. 1076, 1078.

compliance with a valid regulation will fully discharge any related statutory duty, it will constitute no defense to an allegation of common law negligence.[223] It has been further held that failure to take out workmen's compensation coverage would not be excused despite the employer's reliance on a departmental ruling that he was outside the statute.[224] Finally, there have been numerous decisions that a ruling of the Comptroller of the Currency permitting national banks to pledge their assets to secure private deposits was not binding on other bank creditors even though the ruling had been relied on by bank and "secured" depositors alike.[225]

With respect to the effect of reliance in criminal actions, in only one discovered case has a court, aside from statute, excused a statutory violation committed in reliance on an interpretation of a responsible officer.[226] The circumstances, it was said, negatived criminal intent. Contrary decisions adopt the rule that intention to commit the act in question is sufficient.[227] Cases in which conduct in violation of law has been enjoined[228] are easier to justify since they merely end unwittingly illegal activity without penalizing it.

A respectable number of cases have dealt with the effect of reliance on an administrative pronouncement in a later civil controversy with the Government in which the Government agency adopts a position at variance with its former declaration.[229] In the recent *Reynolds Tobacco* case, involving the federal income tax, the Supreme Court held that a treasury regulation which had remained unchanged through several statutory reenactments could not be retroactively amended to the prejudice of a taxpayer who had acted under

223. Atchison, T. & S. F. Ry. v. Scarlett, 300 U. S. 471 (1937); Franklin v. Nowak, 53 Ohio App. 44, 4 N. E. (2d) 232 (1935). But *cf.* La Bourgoyne, 210 U. S. 95 (1903).

224. Long v. Thompson, 177 Wash. 296, 31 P. (2d) 908 (1934), (1934) 9 WASH. L. REV. 167.

225. Fort Worth v. McCamey, 93 F. (2d) 964 (C. C. A. 5th, 1938); Leonard v. Gage, 94 F. (2d) 19 (C. C. A. 4th, 1938), *cert. denied*, 303 U. S. 653 (1938).

226. People v. Ferguson, 134 Cal. App. 41, 24 P. (2d) 965 (1933); (1934) 22 CALIF. L. REV. 569.

227. Hamilton v. People, 57 Barb. 625 (N. Y. 1870); State v. Foster, 22 R. I. 163, 46 Atl. 833 (1900). The same has been held with respect to a federal tax penalty incurred in reliance on official advice. Searles Real Est. Trust, 25 B. T. A. 1115 (1932). And reliance on the acts of government officers will not defeat an antitrust prosecution. United States v. Socony-Vacuum Oil Co., N. Y. Times, May 7, 1940, p. 1, col. 4; (1940) 49 YALE L. J. 761, 767.

228. Utah Power & Light Co. v. United States, 243 U. S. 389 (1917); Securities & Exch. Comm. v. Torr, 22 F. Supp. 602 (S. D. N. Y. 1938).

229. Although the doctrine has been stated in Duval v. United States, 25 Ct. Cl. 46 (1889) that the government is immune to equitable estoppel, the exceptions are far from infrequent. Walker v. United States, 139 Fed. 409 (C. C. M. D. Ala. 1905), *aff'd*, 148 Fed. 1022 (C. C. A. 5th, 1906) (government acting in sovereign capacity); Denver & R. G. R. R. v. United States, 53 Ct. Cl. 155 (1918) (government engaging in business activity).

the original regulation.[230] The decision laid chief emphasis on the fact of the reenactments. There is some authority, however, for the proposition that, even in the absence of reenactment, a valid regulation may not be retroactively modified.[231] On the other hand, a clearly erroneous regulation is deemed a nullity and reliance upon it affords no protection against a claim by the Government under a subsequent and correct regulation.[232]

CONCLUSION

Observable throughout has been the judicial tendency to assimilate administrative agencies to the corpus of judicial tradition. Courts — remote from the exigencies of practical administration — have inclined to a doctrinaire, rather than a desirably pragmatic, approach in their frequent importation of res judicata principles into the administrative process. With respect to collateral attack, judicial imputation of conclusiveness is largely unexceptionable. Governmental efficiency imperatively demands that decisions for which an adequate review is available be proof against collateral interference. It is, on the other hand, far less important that they be given like effect in independent proceedings embracing a different subject matter. Yet, even here, the application of res judicata rules to orders rendered after full hearing seems not only devoid of prejudice to litigants, but a sizeable contribution to the prestige and authority of non-judicial tribunals.

But the doctrinal utilization of res judicata to hold administrative agencies without power to correct their own prior determinations frequently results in the frustration of a manifest legislative desire to secure administration free of legal strait-jackets. Where legislative policy remains unexpressed, the desirability of permitting agencies to reverse their former action depends principally on the nature of the substantive law administered and on the procedural character of original determinations. In this connection, nevertheless, a judicial policy of laissez-faire seems preferable. Administrative agencies are by far the best qualified to develop their own res judicata practices out of intimate acquaintance with their individual problems. Furthermore, "interference by the courts is not conducive to the development of habits of responsibility in administrative agencies."[233]

230. Helvering v. R. J. Reynolds Tobacco Co., 306 U. S. 110 (1939); see Paul, *Use and Abuse of Tax Regulations in Statutory Construction* (1940) 49 YALE L. J. 660; (1939) 39 COL. L. REV. 716.

231. United States v. Alabama R. R., 142 U. S. 615 (1892); Stanolind Pipe Line Co. v. Tax Comm., 30 F. Supp. 131 (W. D. Okla. 1939). But *cf.* Grand Trunk W. Ry. v. United States, 252 U. S. 112 (1920).

232. Manhattan General Equipment Co. v. Commissioner of Internal Rev., 297 U. S. 129 (1936); Langstaff v. Lucas, 9 F. (2d) 691 (W. D. Ky. 1925), *cert. denied*, 273 U. S. 721 (1926).

233. F.C.C. v. Pottsville Broadcasting Co., 60 Sup. Ct. 437, 443 (U. S. 1940).